WAN RUSDI WAN MUSA A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
MOHTARUDIN BAKI JCA
[CRIMINAL APPEAL NO: C-05-161-2009]
16 FEBRUARY 2012 C

CRIMINAL LAW: *Dangerous Drugs - Trafficking in 6,907g of cannabis - Conviction and sentence - Appeal against - Incriminating items found in car - Car owner unknown, not called to give testimony - Real owner of drugs - Whether reasonable doubts arose - Whether safe to convict appellant* D

CRIMINAL PROCEDURE: *Charge - Alternative charges - Consent of Public Prosecutor to prosecute offences under s. 39B(1)(a), Dangerous Drugs Act 1952 - Alternative charge under s. 39B(1)(c) - Punishable section under s. 39B(3), DDA not mentioned in charge - Miscarriage of justice - Consent signed by Deputy Public Prosecutor - Implicit consent - Whether express consent of Public Prosecutor required* E

Upon being informed that a certain drug trafficking activity was going to take place, Detective Sergeant Mohd Zulkifli bin Mat ('SP5') was directed by his superior ('SP3') to act as an agent provocateur, to purchase the drugs. On the eventful day, SP5 was introduced to the appellant by the informer and the two then discussed the quantum and price of the drugs. After being shown the money, the appellant retrieved from one black-colored plastic bag and a box from the boot of a Perodua Kancil motor car. The appellant showed the contents of the box to SP5 and satisfied that they were drugs, SP5 signaled the ambush party led by SP3. The appellant was then arrested and dried vegetable matters suspected to be drugs were found in the black-colored plastic bag and the box. The appellant was taken to the Bentong District Police Headquarters with all the exhibits seized. Since the keys were not recovered, the motor car had to be towed. A chemist report later confirmed that the contents of the black-colored F G H I

A plastic and box were indeed 6,907g of cannabis. Two days later, one Nordin bin Mohd Noor ('Nordin') was arrested and this led to the recovery of the car keys. The appellant testified that the motor car was used by Nordin and two others and that he did not know who the car owner was. The appellant and Nordin
B were charged with doing an act preparatory to or for the purpose of trafficking 6907g of cannabis, an offence under s. 39B(1)(c) of the Dangerous Drugs Act 1952 ('DDA'). At the close of the prosecution's case, Nordin was acquitted and discharged, while the appellant was subsequently and eventually convicted and
C sentenced to death under s. 39B(2) of the DDA. Aggrieved by the conviction and sentence, the appellant appealed. In the present appeal, it was argued that there was a miscarriage of justice as the Public Prosecutor's consent to prosecute was only in regard to an offence order s. 39B(1)(a) of the DDA,
D notwithstanding that there was an alternative charge under s. 39B(1)(c) of the DDA was not mentioned in the charge.

Held (allowing appeal; substituting conviction with conviction for possession under s. 6 DDA and sentencing
E **appellant to 20 years' imprisonment)**
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The consent of the Public Prosecutor under s. 39B(3) of the
F DDA and the requisition under s. 41A(1) of the DDA specified the offence to be under s. 39B(1)(a) of the DDA and not under s. 39B(1)(c) of the DDA. Even the opening speech of the learned Deputy Public Prosecutor pursuant to s. 179 of the Criminal Procedure Code ('CPC') alluded to an
G offence under s. 39B(1)(a). The consent under s. 39B(3) of the DDA cannot then be said to have been given by way of a mature deliberation after the factual *matrix* of the case had been weighed mentally. Section 39B of the DDA made reference to 'traffic in a dangerous drug' while s. 39B(1)(c) of
H the DDA alluded to the phrase 'do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug'. (para 22)

(2) It cannot be argued that the appellant had lost the chance to be acquitted by the High Court just because the consent
I under s. 39B(3) of the DDA that was issued for an offence

under s. 39B(1)(a) of the DDA was used for an offence under s. 39B(1)(c) of the DDA. (*Tarmizi Yacob & Anor v. PP & Another Appeal*; folld). Before the High Court, the prosecution was conducted by a Deputy Public Prosecutor and the consent too was signed and issued by a Deputy Public Prosecutor acting pursuant to s. 376(3) of the CPC. As such no written consent of the Public Prosecutor was required to convict the appellant as consent was implicit. (para 29)

(3) There was no evidence to prove that the appellant was exclusively in custody and control of the motor car before his arrest as it was not locked and anyone could have had access to it. The owner of the motor car should have been called because he was the umbilical cord to connect the drugs to the appellant and to close the gaps in the prosecution's case. Only a feeble attempt was made to trace him and that attracted the invocation of adverse inference under s. 114(g) of the Evidence Act 1950. His statement recorded under s. 112 of the CPC was also not tendered pursuant to s. 32(1)(i) of the Evidence Act 1950. Such failure brought to the fore the question of who was in actual control of the said motor car prior to the arrest of the appellant. (paras 36 & 39-40)

(4) There was evidence of a negotiated sale to show knowledge of the drugs on the appellant's part. However, the fact that the appellant's DNA, fingerprints and thumbprints were found on the car and the incriminating items only showed possession of the drugs and not trafficking in the said drugs as per the charge. There was no credible evidence linking the appellant to the drugs that were found in the said motor car. (paras 31 & 38)

Bahasa Malaysia *Translation Of Headnotes*

Sebaik sahaja mendapat maklumat bahawa suatu aktiviti pengedaran dadah akan dijalankan, Detektif Sarjan Mohd Zulkifli bin Mat ('SP5') telah diarahkan oleh ketuanya ('SP3') agar bertindak sebagai ejen perangkap untuk membeli dadah. Pada hari kejadian, SP5 telah diperkenalkan kepada perayu oleh pemberi maklumat, dan kedua-dua mereka kemudiannya berbincang mengenai jumlah dan harga dadah-dadah tersebut. Setelah menunjukkan wang, perayu mengambil satu beg plastik hitam dan

kotak dari but kereta Perodua Kancilnya. Perayu menunjukkan kandungan kotak tersebut kepada SP5 dan setelah berpuas hati bahawa ia adalah dadah, SP5 memberi isyarat kepada pasukan serangan hendap yang diketuai oleh SP3. Perayu kemudiannya ditangkap dan material dedaun kering disyaki dadah ditemui dalam beg plastik hitam dan kotak tersebut. Perayu dibawa ke Ibu Pejabat Polis Daerah Bentong berserta kesemua ekshibit yang dirampas. Oleh kerana kuncinya tidak dijumpai, kereta tersebut terpaksa ditunda. Satu laporan ahli kimia kemudiannya mengesahkan bahawa kandungan beg plastik hitam dan kotak tersebut sememangnya 6,907g ganja. Dua hari kemudian, seorang Nordin bin Mohd Noor ('Nordin') telah ditangkap dan ini membawa kepada pemerolehan kunci kereta. Adalah keterangan perayu bahawa kereta tersebut telah digunakan oleh Nordin dan dua yang lain dan bahawa dia tidak mengetahui pemilik sebenar kereta tersebut. Perayu dan Nordin telah dituduh atas kesalahan membuat persediaan untuk mengedar 6,907g ganja, suatu kesalahan di bawah s. 39B(1)(c) Akta Dadah Berbahaya 1952 ('ADB'). Pada penutup kes pendakwaan, Nordin dibebaskan manakala perayu kemudian dan pada akhirnya telah disabitkan dan dijatuhkan hukuman mati di bawah s. 39B(2) ADB. Terkilan dengan sabitan dan hukuman tersebut, perayu merayu. Dalam rayuan ini, perayu menghujahkan bahawa terdapat ketidakadilan kerana persetujuan untuk mendakwa oleh Pendakwa Raya adalah bagi kesalahan di bawah s. 39B(1)(a) ADB, walaupun terdapat tuduhan alternatif di bawah s. 39B(1)(c) ADB.

Diputuskan (membenarkan rayuan; menggantikan sabitan dengan sabitan di bawah s. 6 ADB dan menjatuhkan hukuman 20 tahun penjara)

Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Persetujuan Pendakwa Raya di bawah s. 39B(3) ADB dan rekuisisi di bawah s. 41A(1) ADB menyatakan bahawa kesalahan tersebut adalah di bawah s. 39B(1)(a) ADB dan bukan di bawah s. 39B(1)(c) ADB. Malah, ucapan pembukaan Timbalan Pendakwa Raya menurut s. 179 Kanun Tatacara Jenayah ('KTJ') merujuk kepada suatu kesalahan di bawah s. 39B(1)(a). Maka persetujuan di bawah s. 39B(3) ADB tidak boleh dikatakan telah diberi berdasarkan pertimbangan matang selepas matriks fakta kes dipertimbangkan secara mental.

Seksyen 39B ADB merujuk kepada 'pengedaran dadah berbahaya' manakala s. 39B(1)(c) ADB pula merujuk kepada frasa 'melakukan atau menawarkan untuk melakukan satu perbuatan persediaan kepada atau bagi tujuan mengedar dadah berbahaya'.

(2) Ianya tidak boleh dihujahkan bahawa perayu telah hilang peluang untuk dibebaskan oleh Mahkamah Tinggi cuma kerana persetujuan di bawah s. 39B(3) ADB yang telah dikeluarkan bagi suatu kesalahan di bawah s. 39B(1)(a) ADB telah digunakan untuk kesalahan di bawah s. 39B(1)(c) ADB. (*Tarmizi Yacob & Anor v. PP & Satu lagi Rayuan*; diikuti). Di hadapan Mahkamah Tinggi, pendakwaan telah dijalankan oleh seorang Timbalan Pendakwa Raya dan persetujuan juga ditandatangani oleh seorang Timbalan Pendakwa Raya bertindak di bawah s. 376(3) KTJ. Oleh itu tiada kebenaran bertulis oleh Pendakwa Raya dikehendaki untuk menyabitkan perayu kerana persetujuan adalah tersirat.

(3) Tiada keterangan untuk membuktikan bahawa perayu mempunyai jagaan dan kawalan eksklusif ke atas kereta tersebut sebelum dia ditangkap kerana ia tidak dikunci dan sesiapa sahaja boleh mempunyai akses ke atasnya. Pemilik kereta tersebut sepatutnya dipanggil kerana dia adalah tali yang menyambungkan dadah kepada perayu dan untuk merapatkan jurang dalam kes pendakwaan. Percubaan mengesannya tidak dibuat secara bersungguh-sungguh dan ini menyebabkan tanggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950. Kenyataannya yang direkodkan di bawah s. 112 KTJ tidak ditender menurut s. 32(1)(i) Akta Keterangan 1950. Kegagalan tersebut membangkitkan persoalan siapa yang sebenarnya berada dalam kawalan sebenar kereta sebelum penangkapan perayu.

(4) Terdapat bukti rundingan jualan yang menunjukkan pengetahuan tentang dadah di pihak perayu. Walau bagaimanapun, fakta bahawa DNA, cap jari dan cap ibu jari perayu ditemui pada kereta dan barangan yang menunjukkan kebersalahan hanya mempamerkan pemilikan dadah dan bukan pengedaran dadah-dadah tersebut seperti yang dituduh. Tiada bukti kukuh yang mengaitkan perayu kepada dadah yang ditemui dalam kereta tersebut.

Case(s) referred to:

Abdul Hamid v. PP [1956] 1 LNS 3 HC ***(refd)***

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***

Garmaz Pakhar & Anor v. PP [1995] 3 SLR 701 ***(refd)***

Lyn Hong Yap v. PP [1953] 1 LNS 52 CA ***(refd)***

Mraz v. The Queen [1955] 93 CLR 493 ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Perumal v. PP [1970] 1 LNS 101 FC ***(refd)***

PP v. A Rashid Ismail [2001] 1 AMR 1149 ***(refd)***

PP v. Chan Peng Fatt [1999] 8 CLJ 414 HC ***(refd)***

PP v. Datuk Hj Dzulkifli [1982] CLJ 29; [1982] CLJ (Rep) 644 HC ***(refd)***

PP v. Ibrahim Mahmud [2001] 3 CLJ 284 HC ***(refd)***

PP v. Kalaiselvan [2001] 1 LNS 24 HC ***(refd)***

PP v. Lee Chwee Kiok [1977] 1 LNS 96 HC ***(refd)***

PP v. Lim Boon Hock & Ors [1985] 1 CLJ 368; [1985] CLJ (Rep) 688 HC ***(refd)***

PP v. Md Alim Samad [1998] 5 CLJ 590 HC ***(refd)***

PP v. Mohamed Halipah Adan [1981] CLJ 92; [1981] CLJ (Rep) 238 HC ***(refd)***

PP v. Mohd Fahmi Hamzah [2002] 1 LNS 59 HC ***(refd)***

PP v. Mohd Zambri Mohd Zelah [2004] 1 LNS 522 HC ***(refd)***

PP v. Nik Ahmad Aman Nik Mansor [2002] 6 CLJ 369 HC ***(refd)***

PP v. Nordin Awang [2000] 1 LNS 288 HC ***(refd)***

PP v. Oie Hee Koi & Associated Appeals [1967] 1 LNS 132 PC ***(refd)***

PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***

PP v. Rosyatimah Neza & Anor [1989] 1 CLJ 481; [1989] 2 CLJ (Rep) 364 HC ***(refd)***

R v. Russell-Jones [1995] 3 All ER 239 ***(refd)***

Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***

Tan Thong Jin v. PP [2002] 3 CLJ 552 CA ***(refd)***

Tarmizi Yacob & Anor v. PP & Another Appeal [2010] 8 CLJ 501 FC ***(refd)***

Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 60(1)

Criminal Procedure Code, ss. 112, 376(3)

Dangerous Drugs Act 1952, ss. 39A(2), 39B(1)(a), (b), (c), (2), (3), 41A(1)

Evidence Act 1950, ss. 32(1)(i), 114(g)

Penal Code, s. 34

Criminal Appeal Act 1912 [NSW], s. 6(1)

For the appellant - Wan Jawahir Harun; M/s Wan Jawahir & Co
For the prosecution - Munahyza Mustafa DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-04-2007]

Reported by Najib Tamby

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] Initially, Wan Rusdi bin Wan Musa ('the appellant herein') with Nordin bin Mohd Nor ("Nordin") were charged for trafficking cannabis weighing 6,907 grammes on 15 July 2006 at about 8.30pm at the Genting Sempah R & R, Bukit Tinggi in the district of Bentong, Pahang, an offence under s. 39B(1)(c) of the Dangerous Drugs Act 1952 ("DDA") and punishable under s. 39B(2) of the DDA read with s. 34 of the Penal Code. At the close of the prosecution's case, Nordin was acquitted and discharged by the High Court. The prosecution did not appeal against the decision of the High Court in acquitting and discharging Nordin at the close of the prosecution's case.

[2] The defence of the appellant was taken under oath and he too called a witness in support, namely, Wan Rosnaida binti Wan Musa ('SD2').

[3] At the end of the defence case, the appellant was convicted under s. 39B(1)(c) of the DDA and sentenced to death under s. 39B(2) of the DDA. Aggrieved, he now appeals to this Court.

The Factual Matrix

[4] Within a short compass, the facts may be stated as follows. Detective sergeant Mohd Zulkifli bin Mat ('SP5'), a senior police officer attached to the Kuantan polis station, received an information from an informer about a drug trafficking activity that was carried out by a person named "DI". On receipt of this crucial information, SP5 informed his superior officer by the name of ASP Xavier Soosainathan ('SP3') about the matter. SP3 then directed SP5 to be an agent provocateur and to arrange a meeting with "DI" on the pretext of buying drugs.

[5] On 14 July 2006, the informer informed SP5 that "DI" was willing to meet SP5 on 15 July 2006 at the Genting Sempah R & R at approximately 7pm. SP5 relayed this information to SP3 and the latter called a meeting of his police personnel including SP5 and briefed them about an operation to trap and arrest "DI" - the target.

[6] In that briefing, SP5 was directed by SP3 to meet the target through the informer. SP5 was also directed to purchase 7 kilogrammes of cannabis from the target on a one to one basis without the presence of the informer. And for this purpose, SP5 was given RM30,000 placed in a sling bag meant to purchase the cannabis. SP5 was also directed that as soon as SP5 had sight of the drugs, he was to give the following signal to the other police personnel: to drop a cigarette box and to pick it up. Upon seeing that signal, the police personnel will act to detain the target.

[7] On 15 July 2006 at approximately 7pm, the informer met SP5 at McDonald's at Genting Sempah R & R. Not long thereafter, the target arrived. After the informer had introduced the target to SP5, the informer left the scene. The coast was clear, so to speak, for SP5 to deal direct with the target. In the High Court, the target was indentified by SP5 to be the appellant.

[8] SP5 then discussed with the appellant in regard to the quantum and price of the drugs. After the appellant was shown the moneys in the sling bag, the appellant then brought SP5 to a red Perodua Kancil motor car bearing registration number WGG 9995 which was parked at the parking lot in front of the McDonald's restaurant.

[9] The Perodua Kancil motor car was not locked and the appellant was seen by SP5 opening the front door of the said motor car on the driver's side and pulling the lever in order to open the boot of the said motor car. From the boot, the appellant took out one black coloured plastic bag (exh. "P18") and placed it at the rear passenger's seat. Again, the appellant took out from the boot of the said motor car, a box bearing the word "Greentek" (exh. "P21") and the appellant handed it to SP5. When asked by SP5 as to the contents of the box (exh. "P21"), the appellant spontaneously replied "BARANG LA" and at the same time, the appellant took the box (exh. "P21") from SP5 and the appellant opened the top part of the said box and showed its

contents to SP5. Having done that, the appellant then placed the said box together with its contents at the rear seat of the said motor car. A

[10] Satisfied that there were drugs inside the box (exh. "P21"), SP5 pretended that he wanted to pay and SP5 then gave the pre-arranged signal to arrest by dropping his cigarette box and picking it up again. SP5 then took to his heels when SP3 and the police party rushed in to arrest the appellant. SP3 and the police party succeeded in arresting the appellant. SP3 examined the contents of the black coloured plastic bag (exh. "P18") and the box (exh. "P21") and found compressed dried vegetable matters suspected to be cannabis therein. B C

[11] All the exhibits that were seized together with the appellant were then taken to the Bentong district police headquarters. The Perodua Kancil motor car had to be towed to the said police station because the keys were not recovered from the appellant. At the said police station, SP3 marked all the exhibits and prepared the "Senarai bongkar" (exh. "P15") and lodged a police report *vide* Bukit Tinggi report number 490/2006 (exh. "P16"). SP3 also handed all the exhibits that have been marked together with the appellant to the investigating officer Chief Inspector Pribhakaran (SP12). D E

[12] After reading the police report (exh. "P16"), SP12 proceeded, just like SP3, to mark all the exhibits also. However, SP12 did not mark the Perodua Kancil motor car. F

[13] On 16 July 2006 at about 2.30pm, SP12 directed the police photographer Detective Corporal 131007 Rosli bin Zahari (SP2) to take seven photographs of the exhibits and these photographs were marked as exhs. ("P9A-G"). On the same day at about 4.25pm, SP12 directed SP2 to take five photographs of the Perodua Kancil motor car (exhs. ("P8A-E"). G

[14] On 17 July 2006 at about 9.45pm, Nordin was arrested and he led the police to the recovery of the keys (exh. "P14") to the Perodua Kancil motor car at the public toilet of the Genting Sempah R & R. H

[15] In due course, the government chemist Abdul Rahim bin Shadan ('SP4') analysed and confirmed that the packages contained dangerous drugs, to wit, 6,907 grammes of cannabis within the meaning of the DDA. I

[16] The prosecution also led evidence of the presence of DNA belonging to the appellant on at least two items that were found in the Perodua Kancil motor car. Again, the fingerprints lifted from the Perodua Kancil motor car belonged to the appellant. Even the thumbprint lifted on one of the packets belonged to the appellant.

The Defence

[17] The appellant testified under oath along the following lines. One week before his arrest, he accompanied his sister ('SD2') to register at UiTM Shah Alam on her final semester term. They travelled by bus from Kelantan and upon arrival at the bus stop at Kuala Lumpur, Nordin fetched them and brought them to Nordin's house at Taman Mekar, Ampang. According to the appellant, he did not bring anything from Kelantan. He said that he stayed at Nordin's house for about a week. He said that the Perodua Kancil was used by Nordin and two others and he said that he did not know who owned the said motor car.

[18] On 15 July 2006 at about 7pm, the appellant drove the Perodua Kancil motor car with Nordin as a passenger and they stopped at Genting Sempah R & R. After the appellant locked the Perodua Kancil motor car, he handed the car keys (exh. "P14") to Nordin and they then parted company. The appellant went to purchase cigarettes and he also went to the McDonald's restaurant to eat and there he met a friend by the name of "Mail" whom he knew for the last three years. He spoke to "Mail" for about five minutes and "Mail" then left him. He ate at the McDonald's restaurant for about 50 minutes. Then he walked towards the Perodua Kancil motor car. He saw a man whom he did not know standing near the Perodua Kancil motor car. While he was waiting for Nordin, he found that the left rear door of the said motor car was ajar and the window half opened. The appellant examined the said motor car and found a box located on the floor board of the left rear passenger's seat. He lifted the box and placed it on the seat to enable him to gain access to the right rear door of the said motor car and to open the same. Having opened the right rear door of the said motor car, he got out and proceeded to open the driver's side of the door and he pulled the lever in order to open the boot of the said motor car. From the boot, he took out one black coloured plastic bag (exh. "P18") and placed it on the seat of the front left passenger's side. He then checked the spare tyre and found that it was intact.

[19] The appellant testified further and he said that when he first drove the Perodua Kancil motor car, the black coloured plastic bag (exh. "P18") and the box bearing the word "Greentek" (exh. "P21") were not inside the said motor car. He too testified that he did not open exh. "P18" and exh. "P21" and he did not know their contents. When he was about to close the boot of the said motor car, he was assaulted with a blunt object and he fell down and became unconscious. When he regained consciousness, he realised that he was arrested. And the police showed him the exhibits to the case only upon arrival at the police station. There he was forced to sign the "Senarai Bongkar" (exh. "P15"). He denied meeting and discussing with SP5. He said that there was another male person whom he did not know who also got out from the McDonald's restaurant as he did and proceeded towards the said motor car. He denied showing the contents of the box (exh. "P21") to SP5.

[20] The evidence of SD2 went along the following lines. She is the sister of the appellant. She testified that in July 2006, the appellant accompanied her by bus to go to Kuala Lumpur from Kelantan because she wanted to register for her final semester term at UiTM Shah Alam. According to her, the appellant did not bring anything with him to Kuala Lumpur because he would be returning back to Kelantan. Upon arrival at the bus station in Kuala Lumpur at about 5am, Nordin fetched both of them and brought them to Nordin's house at Rawang. According to her, Nordin stayed in the house in Rawang with his friends. That morning, SD2 went to the UiTM Shah Alam campus by herself. SD2 confirmed that she did not know what transpired after that.

Analysis

[21] Questions of law were raised in the amended petition of appeal and it was argued accordingly before us. It was argued that there were two charges against the appellant. The principal charge was under s. 39B(1)(a) of the DDA and punishable under s. 39B(2) of the DDA read with s. 34 of the Penal Code. The alternative charge was under s. 39B(1)(c) of the DDA and punishable under s. 39B(2) of the DDA read with s. 34 of the Penal Code. Yet the learned Judicial Commissioner ("JC") of the High Court in his written grounds of judgment laid emphasis on the alternative charge and found a *prima facie* case against the appellant under the alternative charge and after hearing the appellant's defence convicted the appellant under the alternative charge and sentenced him to death. However, the consent of the

public prosecutor under s. 39B(3) of the DDA and the requisition under s. 41A(1) of the DDA specified the offence to be under s. 39B(1)(a) of the DDA read with s. 34 of the Penal Code and there was no mention of the punishable section under s. 39B(2) of the DDA. For case of reference, the consent under s. 39B(3) of the DDA and the requisition under s. 41A(1) of the DDA are hereby reproduced (see p. 9 of the appeal record at Jilid 1):

AKTA DADAH BERBAHAYA 1952
(AKTA 234)

IZIN DI BAWAH SEKSYEN 39B(3)
REKUISISI DI BAWAH SEKSYEN 41A(1)

PADA menjalankan kuasa-kuasa yang diberi kepada Pendakwa Raya oleh seksyen 39B(3) Akta Dadah Berbahaya 1952 dan terletak hak pada saya menurut seksyen 376(3) Kanun Tatacara Jenayah, saya ASLINA BINTI JONED Timbalan Pendakwa Raya, dengan ini memberi izin bagi pendakwaan:

1. WAN RUSDI BIN WAN MUSA
KP NO: 780213-03-5435; dan

2. NORDIN BIN MOHD NOOR
KP NO: 680130-03-5247

lanjutan dari niat bersama memperedarkan dadah berbahaya, iaitu 6907 gram Canabis suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama seksyen 34 Kanun Keseksaan yang dikatakan telah dilakukan pada 15 Julai 2006, lebih kurang jam 8.30 malam di kawasan tempat letak kereta R & R, Genting Sempah, Bukit Tinggi, Bentong, Pahang.

DAN, selanjutnya, pada menjalankan kuasa-kuasa yang diberi kepada saya di bawah seksyen 41A(1) Akta Dadah Berbahaya 1952, saya, dengan ini menghendaki supaya kes;

1. WAN RUSDI BIN WAN MUSA
KP NO: 780213-03-5435; dan

2. NORDIN BIN MOHD NOOR
KP NO: 680130-03-5247

tersebut dibicarakan di Mahkamah Tinggi Malaya di Temerloh, Pahang.

BERTARIKH pada 29 Disember 2006.
Sgd. (Illegible)
(ASLINA BINTI JONED)
Timbalan Pendakwa Raya.

[22] It is a statutory requirement that the consent of the public prosecutor under s. 39B(3) of the DDA is required before a prosecution under 39B(1)(a) or (b) or (c) of the DDA is instituted. Consent is said to be "an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side" (*Abdul Hamid v. PP* [1956] 1 LNS 3). The consent of the public prosecutor under s. 39B(3) of the DDA and the requisition under s. 41A(1) of the DDA specified the offence to be under s. 39B(1)(a) of the DDA and not under s. 39B(1)(c) of the DDA. Even the opening speech of the learned deputy public prosecutor pursuant to s. 179 of the Criminal Procedure Code ("CPC") alluded to an offence under s. 39B(1)(a) of the DDA. Can the consent under s. 39B(3) of the DDA as reproduced earlier be said to have been given by way of a mature deliberation after weighing mentally the factual matrix of the case? We were invited to answer this crucial question in the negative bearing in mind that s. 39B(1)(a) of the DDA makes reference to "traffic in a dangerous drug" while s. 39B(1)(c) of the DDA alludes to the phrase to "do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug".

[23] Although there is no requirement for consent under s. 39B(3) of the DDA to be given in writing, the existence of a written consent is useful in answering any subsequent challenge like the present case at hand. Now, since the consent here is in writing and signed, it is *prima facie* evidence of the existence of the relevant consent. However, it was argued that that consent applying *PP v. Lee Chwee Kiok* [1977] 1 LNS 96 made the trial a nullity (per Harun J (later SCJ)) bearing in mind that it specified an offence under s. 39B(1)(a) of the DDA and not s. 39B(1)(c) of the DDA of which the appellant was convicted and sentenced to death. Harun J (later SCJ) in *PP v. Lee Chwee Kiok (supra)* had this to say:

> It will be observed that although the original and amended charges are two distinct offences, they are both created by the same section of the law viz. S. 39B(1) and both carry the same penalty. Both require the consent of the Public Prosecutor under s. 39B(3). The learned Deputy Public Prosecutor argued that the amendment was technical and as the Public Prosecutor had given his consent on the original charge he was at liberty to amend the charges in the manner he did. I do not think so. It was held in *Abdul Hamid v. Public Prosecutor* [1956] 1 LNS 3 that a consent to prosecute 'is an act of reason, accompanied with deliberation,

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> the mind weighing, as in a balance, the good and evil on each side'. The Public Prosecutor has clearly exercised his mind in respect of the original charge when he gave his consent to prosecute some four months after the alleged offence. It was incumbent on him however to exercise the same degree of deliberation in respect of the amended charge. He has not done so.

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[24] In *Tarmizi Yacob & Anor v. PP & Another Appeal* [2010] 8 CLJ 501, the Federal Court was concerned with the appellants in two appeals who were originally charged with an offence under

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s. 39B(1)(a) of the DDA read with s. 34 of the Penal Code. At the end of the trial, both were however convicted and sentenced to death on the amended charge under s. 39B(1)(c) of the DDA read with s. 34 of the Penal Code. The Federal Court agreed that consent to the amended charge preferred against the appellants

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would be superfluous as the prosecution was conducted by a deputy public prosecutor.

[25] It was argued that the case of *Tarmizi Yacob (supra)* can be differentiated factually. There the trial proceeded for an offence

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under s. 39B(1)(a) of the DDA and at the end of the trial, both the appellants were convicted and sentenced to death for an offence under s. 39B(1)(c) of the DDA read with s. 34 of the Penal Code. Here, there were two charges. The first under s. 39B(1)(a) of the DDA and there was consent for it. The

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second was an alternative charge under s. 39B(1)(c) of the DDA and the learned JC in his judgment alluded to the offence under s. 39B(1)(c) of the DDA where there was no consent and at the end of the trial convicted the appellant under s. 39B(1)(c) of the DDA read with s. 34 of the Penal Code.

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[26] Before us, it was strenuously argued that there was a miscarriage of justice when the consent in the present appeal was in regard to s. 39B(1)(a) of the DDA right from the start notwithstanding that there was an alternative charge under

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s. 39B(1)(c) of the DDA.

[27] The proviso to s. 60(1) of the Courts of Judicature Act 1964 carries the expression "miscarriage of justice". The full text of the proviso reads as follows:

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> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[28] And the proviso to s. 60(1) of the Courts of Judicature Act 1964 is similar to the proviso of s. 6(1) of the New South Wales Criminal Appeal Act 1912 and, in this context, it is germane to refer to the passage of Fullagar J in *Mraz v. The Queen* [1955] 93 CLR 493 at p. 514 where His Lordship had this to say about the phrase "miscarriage of justice":

> It is very well - established that the proviso to section 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

[29] Since "every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed", can it be argued that the appellant has lost the chance to be acquitted by the High Court when the consent under s. 39B(3) of the DDA that was issued for an offence under s. 39B(1)(a) of the DDA was used for an offence under s. 39B(1)(c) of the DDA? By virtue of the doctrine of *stare decisis*, we are bound by the decision of the Federal Court in *Tarmizi Yacob (supra)* and, consequently, the answer to the question posed would be in the negative. It must be recalled that before the High Court, the prosecution was conducted by a Deputy Public Prosecutor and the consent too was signed and issued by a Deputy Public Prosecutor acting pursuant to s. 376(3) of the CPC. As such, no written consent of the Public Prosecutor is required for convicting the appellant for an offence under s. 39B(1)(c) of the DDA for the simple reason that the consent of the public prosecutor is implicit (*Lyn Hong Yap v. PP* [1953] 1 LNS 52, CA; *PP v. Oie Hee Koi & Associated Appeals* [1967] 1 LNS 132, PC; *Perumal v. PP* [1970] 1 LNS 101, FC; *PP v. Mohamed Halipah Adan* [1981] CLJ 92; [1981] CLJ (Rep) 238, HC; *PP v. Datuk Hj Dzulkifli* [1982] CLJ 29; [1982] CLJ (Rep) 644, HC; *PP v. Lim Boon Hock & Ors* [1985] 1 CLJ 368; [1985] CLJ (Rep) 688, HC; and *Garmaz Pakhar & Anor v. PP* [1995] 3 SLR 701, HC Singapore).

[30] But the evidence adduced by the prosecution is far from satisfactory. There was no evidence as to who parked the Perodua Kancil motor car at the place mentioned in the charge. Neither was there evidence as to who put the drugs in the said motor car. The said motor car was unlocked at the material time. And the keys were not found inside the said motor car. The evidence showed that the said motor car had to be towed to the Bentong district police headquarters. And it was Nordin who led the police to the recovery of the keys (exh. "P14") at the public toilet of the Genting Sempah R & R.

[31] It was argued that there was no credible evidence linking the appellant to the drugs that were found in the said motor car. The appellant had no exclusive possession of the drugs in the said motor car bearing in mind that the registered owner of the said motor car was not the appellant but rather one person by the name of Zahariman bin Alias ("Zahariman"). Exclusivity of possession is the hallmark to attract criminal liability for an offence of possession (*PP v. Chan Peng Fatt* [1999] 8 CLJ 414; *PP v. Nordin Awang* [2000] 1 LNS 288; *PP v. A Rashid Ismail* [2001] 1 AMR 1149; *PP v. Ong Cheng Heong* [1998] 4 CLJ 209; *PP v. Ibrahim Mahmud* [2001] 3 CLJ 284; *PP v. Nik Ahmad Aman Nik Mansor* [2002] 6 CLJ 369; *PP v. Kalaiselvan* [2001] 1 LNS 24; *PP v. Mohd Zambri Mohd Zelah* [2004] 1 LNS 522; *PP v. Rosyatimah Neza & Anor* [1989] 1 CLJ 481; [1989] 2 CLJ (Rep) 364; *PP v. Md Alim Samad* [1998] 5 CLJ 590; and *Tan Thong Jin v. PP* [2002] 3 CLJ 552, CA). Here, the prosecution did not lead evidence to show that it was the appellant who drove the said motor car to the Genting Sempah R & R on the date of the offence. But, in his defence, the appellant admitted driving the said motor car to the Genting Sempah R & R with Nordin as a passenger and parked the said motor car there. After having locked the said motor car, the appellant then handed the car keys (exh. "P14") to Nordin. But the appellant disassociated himself from the drugs found in the said motor car entirely.

[32] Exclusivity of possession is required to sustain a conviction either for the offence of possession or trafficking of the dangerous drugs under the DDA. It is the duty of the prosecution to discharge this onerous burden. It is not the duty of the defence to supplement the case for the prosecution (*Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19, SC).

[33] Now, the failure of the prosecution to call Zahariman as the registered owner of the said motor car invariably leads to a number of inferences - one of which must be construed in favour of the appellant. Spencer Wilkinson J in *Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948-1949] MLJ Supp 105 aptly said at p. 108 of the report:

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

[34] In the absence of Zahariman, we cannot rule out the possibility that the drugs were put inside the said motor car by Zahariman bearing in mind that the said motor car was unlocked when the appellant opened it in the presence of SP5. In his testimony, SP5 confirmed that the said motor car was unlocked (see p. 89 of the appeal record at Jilid 1):

> Sebaik sahaja sampai dekat kereta Kancil warna merah nombor pendaftaran WGG 9995, 'Di' (referring to the appellant) telah membuka pintu kanan hadapan yang tidak berkunci dan menaikkan boot bahagian belakang.

[35] According to SP12, he met Zahariman after SP6 recorded Zahariman's statement under s. 112 of the CPC (see the examination-in-chief of SP12 at p. 160 of the appeal record at Jilid 1 at para. 20). But Zahariman was not called by the prosecution nor was his statement recorded under s. 112 of the CPC tendered as an exhibit. SP12 tried to trace Zahariman but was unsuccessful. No explanation was advanced as to why the s. 112 statement of Zahariman was not tendered. It was a material document that was not tendered and we accordingly invoke s. 114(g) of the Evidence Act 1950. The attempts made to trace Zahariman were insufficient and unreasonable in the circumstances. At pp. 160 to 161 of the appeal record at Jilid 1, SP12 testifed about the attempts to trace Zahariman in this way:

> Saya ada cuba mengesan Zahariman di alamat terakhir tetapi tidak dapat dikesan. Selepas terima pengesahan dari JPJ, tiada siasatan lain dijalankan.

[36] To say the least, it was a feeble attempt to trace Zahariman and that attracts the invocation of adverse inference under s. 114(g) of the Evidence Act 1950 (*Munusamy Vengadasalam v.*

A *Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, SC; *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 FC; and *PP v. Mohd Fahmi Hamzah* [2002] 1 LNS 59).

[37] The prosecution in *PP v. Nordin Awang (supra)* did not call B or offer one Mohd Yusoff who had custody of the van in which the drugs were found and the court invoked s. 114(g) of the Evidence Act 1950 and held that there was a gap in the prosecution's case. Here, the non-calling of Zahariman as the registered owner of the Perodua Kancil motor car had created a C gap in the prosecution's case. It is our judgment that the appellant has been prejudiced or disadvantaged by the failure of the prosecution to call Zahariman - a material witness. In our judgment, the fair trial of the appellant has been compromised (*R v. Russell-Jones* [1995] 3 All ER 239 CA).

D **[38]** We acknowledge that there was evidence of a negotiated sale to show knowledge of the drugs on the part of the appellant. We also acknowledge that the appellant's DNA presence was detected on at least two items found in the said motor car. We further acknowledge that finger-prints lifted from the said motor car E belonged to the appellant and that the appellant's thumb print was also lifted on one of the packets. But all these showed possession of the drugs and not trafficking in the said drugs as per the charge. The impediments as alluded to earlier impinged on the prosecution's case and it had prejudiced or disadvantaged the F appellant beyond redemption for the non-calling of Zahariman as the prosecution's witness and the non-tendering of the 112 statement of Zahariman as an exhibit. These impediments have the effect of casting reasonable doubt on the element of custody and control of the Perodua Kancil motor car in which the drugs were G found.

[39] It is undeniable that the prosecution has the complete discretion to call any number of witnesses subject to the requirement that it has a duty to call all the necessary witnesses H essential to the unfolding of the narrative of the prosecution's case. In our judgment, Zahariman should have been called because he is the umbilical cord to connect the drugs to the appellant and to close the gaps in the prosecution's case (*Ti Chuee Hiang v. Public Prosecutor (supra)*).

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[40] It is our judgment that there is no evidence to prove that the appellant was exclusively in custody and control of the Perodua Kancil motor car before his arrest. The said motor car was not locked and anyone could have access to it. To compound the matter further, the statement of Zahariman recorded under s. 112 of the CPC was not tendered pursuant to s. 32(1)(i) of the Evidence Act 1950 and such failure brings to the fore the question of who was in actual control of the said motor car prior to the arrest of the appellant. The prosecution failed to exclude the possibility that other persons may have had custody or control of the said motor car in which the drugs were found prior to the arrest of the appellant.

[41] For these varied reasons, it is not safe to convict the appellant on the charge of trafficking under s. 39B(1)(c) of the DDA and punishable under s. 39B(2) of the DDA read with s. 34 of the Penal Code. Accordingly, we allowed the appellant's appeal and set aside the conviction and sentence imposed by the High Court. We substituted the conviction to one of possession under s. 6 of the DDA and punishable under s. 39A(2) of the DDA. Since the appellant was found to be in possession of a large quantity of cannabis weighing 6,907 grammes, we sentenced the appellant to 20 years imprisonment from the date of arrest (15 July 2006) plus the mandatory whipping of ten strokes of the rattan.